

1965

Trusts and Succession

Charles L. Knapp

UC Hastings College of the Law, knappch@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Charles L. Knapp, *Trusts and Succession*, 1965 *Ann. Surv. Am. L.* 467 (1965).

Available at: http://repository.uchastings.edu/faculty_scholarship/333

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.



Faculty Publications

UC Hastings College of the Law Library

Author: Charles L. Knapp
Source: Annual Survey of American Law
Citation: 1965 Â Ann. Surv. Am. L. 467 (1965).
Title: *Trusts and Succession*

Originally published in ANNUAL SURVEY OF AMERICAN LAW. This article is reprinted with permission from ANNUAL SURVEY OF AMERICAN LAW and New York University School of Law.

TRUSTS AND SUCCESSION

CHARLES L. KNAPP

PRINCIPAL impetus for change in 1965 came not from the courts, but from the legislatures, particularly in New York, where the continuing work of the Temporary Commission on the Law of Estates has produced several substantive changes of particular importance.¹ Significant case law dealing with the construction of class gifts as relating to adopted children has appeared,² and a leading writer has supplied what should be an important contribution to the developing law in this area.³

I

NONTESTAMENTARY SUCCESSION

Adopted Children.—The principle that an adopted child should be permitted to inherit from his adoptive parents' ascendant and collateral kin is well-established.⁴ The corollary, that an adopted child should no longer inherit from his natural family (and vice versa) has been slower in achieving acceptance,⁵ but recent cases illustrate its strength. In an Indiana case⁶ the decedent's natural brother had been adopted by his aunt; he was held to have lost the right to inherit from the decedent. In a New York case⁷ the deceased had been adopted by a grandaunt; his sisters were barred from inheriting. In Connecticut, a lower court (in the face of seemingly contrary precedent of the state's high court) applied Connecti-

Charles L. Knapp is Assistant Professor of Law at New York University School of Law and a Member of the New York Bar.

The author gratefully acknowledges the assistance in the preparation of this article of Mr. Lee L. Holzman, Board Member of the Annual Survey of American Law, and of Mr. Martin Bercovici, Staff Member.

1. See particularly the text accompanying notes 10-17, 150-53 and 156 *infra*.

2. See text accompanying notes 114-17 *infra*.

3. See text accompanying notes 110-11 and 121 *infra*.

4. E.g., *In re Bunker's Estate*, 211 A.2d 902 (N.H. 1965) (this opinion is virtually a hornbook of New Hampshire succession law; it raises questions of inheritance by adopted children, by illegitimates and by halfbloods, and also raises the issue of representation among collaterals); *Acts of Mass. 1965*, ch. 210; *Laws of Mont. 1965*, ch. 102. Cf. *In re Baker's Estate*, 172 So. 2d 268 (Fla. Dist. Ct. App. 1965) (adopted child of legatee permitted to take under antilapse statute).

5. See generally 7 Page, *Wills* §§ 63.3-63.53 (Bowe-Parker rev. 1963).

6. *Earle v. Indiana Nat'l Bank*, 204 N.E.2d 652 (Ind. 1965).

7. *In re Trainor's Estate*, 45 Misc. 2d 316, 256 N.Y.S.2d 497 (Surr. Ct. 1965).

cut law to bar inheritance by the nephew of a Connecticut domiciliary, where the claimant had been adopted in Nevada by his mother's second husband.⁸

Illegitimate Children.—The hardship of the common law rule that there can be no inheritance through ties of illegitimacy has to some extent been alleviated in every American jurisdiction.⁹ A recent amendment to New York's statute¹⁰ permits an illegitimate child to inherit from his mother even if she has other legitimate children, leaving Louisiana as the single state in which the child may inherit from his mother only in the absence of legitimate children.¹¹

Surviving Spouse.—After years of struggling with the age-old problem of illusion versus reality, as posed on a more mundane level by *Newman v. Dore*¹² and its inconsistent offspring,¹³ New York has taken an entirely new tack by enacting broad legislation which brings into an expanded "testamentary estate," for purposes of the surviving spouse's election, a variety of inter vivos transfers in which the transferor retains some interest, but which had hitherto been immune (usually) from the spouse's attack: gifts causa mortis, Totten trust and joint bank accounts, property held in joint tenancy, and trusts created by the decedent in which he retained a power to revoke, consume or invade.¹⁴ Although the new statute was enacted after years of experience under New York's original right-of-election statute and represents a wealth of careful study,¹⁵ a skeptic may wonder if it will really prevent any but unintentional (or poorly-counseled) disinheritance, since the avenues of avoidance, though fewer, are for the

8. *Rauhut v. Short*, 26 Conn. Supp. 55, 212 A.2d 827 (Super. Ct. 1965). See Atkinson, *Wills* § 23 n.31 (2d ed. 1953). In *Jones v. Lovell*, 251 Miss. 503, 170 So. 2d 431 (1965), the court, in permitting inheritance by the adoptive parent rather than the natural kin, managed to reach a result consonant with a new statute not yet in effect.

9. Atkinson, *Wills* § 22 (2d ed. 1953).

10. N.Y. Deced. Est. Law § 83-a (Supp. 1965). See N.Y. Temporary Comm'n on the Law of Estates, Fourth Report, Legislative Doc. No. 19, at 177 (1965).

11. 7 Page, *Wills* §§ 63.3–63.53 (Bowe-Parker rev. 1963). In addition, New York's statute permits the child to inherit from its father (with a reciprocal right on his part to inherit from the child) if paternity has been adjudicated; New York also joins a growing minority of states which permit the illegitimate to inherit from his maternal kin (with the reciprocal right on their part of inheritance from the illegitimate). *Ibid.*

12. 275 N.Y. 371, 9 N.E.2d 966 (1937).

13. *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941); *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

14. N.Y. Deced. Est. Law §§ 18-a, 18-b (Supp. 1965).

15. See N.Y. Temporary Comm'n on the Law of Estates, Third Report, Legislative Doc. No. 19, at 79-129 (1964), and Fourth Report, Legislative Doc. No. 19, at 104-16 (1965). The statute, though much more elaborate, was patterned after Pennsylvania's. Pa. Stat. Ann. tit. 20, § 301.11 (Supp. 1965).

most part plainly marked.¹⁶ The new law is superior to some other attempts at dealing with inter vivos transactions in at least one respect: It not only subjects to the spouse's right of election all such transfers in favor of third persons, but also makes clear that any such transactions in favor of the surviving spouse will be credited against the elective share.¹⁷

In other developments, the Wisconsin Supreme Court has refused to extend the right of election to a joint bank account,¹⁸ while the 1964 Minnesota decision prospectively extending this right to the Totten trust continues to be the subject of comment, not altogether favorable.¹⁹ The difficulty of dealing with these cases on a piecemeal basis probably makes New York's broadside approach a better one, if the legislature is willing.²⁰

Iron Curtain Acts.—During the past year, the various acts restricting inheritance by nonresident aliens²¹ provoked not only considerable litigation, but a substantial volume of well-founded criticism in the legal periodicals,²² including articles attempting to show that reciprocal rights do exist in the case of Soviet Russia²³ and Poland.²⁴ Among the decided cases, New York courts held against Bulgarian²⁵ and Rumanian²⁶ dis-

16. They include United States bonds, life insurance proceeds, and pension and retirement funds. N.Y. Deced. Est. Law § 18-a(2) (Supp. 1965). For a general critique of the new statute, see Soled, *The Surviving Spouse's Right of Election; Its Current Status in New York and Trends Elsewhere*, 155 N.Y.L.J. Nos. 6, 7 & 8, p. 1, col. 4 (1966).

17. N.Y. Deced. Est. Law § 18-b(2) (b) (Supp. 1965). The law thus would change the result in a case such as *In re Lotus' Will*, 45 Misc. 2d 170, 256 N.Y.S.2d 311 (Surr. Ct. 1965). In extending the spouse's right of election to Totten trusts, the Restatement does not deal with this problem. Restatement (Second), Trusts § 58, comment *e* (1959).

18. *In re Fucela's Estate*, 26 Wis. 2d 476, 132 N.W.2d 553 (1965). Cf. *In re Michael's Estate*, 26 Wis. 2d 382, 132 N.W.2d 557 (1965), discussed at notes 32-35 *infra*.

19. *Estate of Jeruzal v. Jeruzal*, 269 Minn. 183, 130 N.W.2d 473 (1964), 34 U. Cinc. L. Rev. 170 (1965), 49 Minn. L. Rev. 203 (1964).

20. The Wisconsin court in *Fucela* clearly admits the result is "harsh," and solicits legislation. *In re Fucela's Estate*, 26 Wisc. 2d at 482, 132 N.W.2d at 556 (1965). The Minnesota court in the *Jeruzal* case delayed the effectiveness of its new rule to give the legislature time to act (it didn't). One commentator has suggested that the court was hoping for broad legislation of the Pennsylvania (and now New York) type. 49 Minn. L. Rev. 203, 210-11 (1965).

21. For a general discussion, see 1964 Ann. Survey Am. L. 588-91.

22. Jones, *Iron Curtain Distributees: A Mounting Problem in Pennsylvania's Orphans' Courts*, 69 Dick. L. Rev. 227 (1965); notes 23 and 24 *infra*.

23. Ginsburgs, *Inheritance by Foreigners under Soviet Law*, 51 Iowa L. Rev. 16 (1965).

24. Krzyzanowski, *American Heirs under the Law of Poland*, 15 Buffalo L. Rev. 105 (1965).

25. *In re Draganoff's Estate*, 46 Misc. 2d 167, 259 N.Y.S.2d 20 (Surr. Ct. 1965), adhering, after reargument, to an earlier decision, 43 Misc. 2d 233, 252 N.Y.S.2d 104 (Surr. Ct. 1964), 1964 Ann. Survey Am. L. 595. See also *In re Draganoff's Estate*, 46 Misc. 2d 855, 260 N.Y.S.2d 996 (Surr. Ct. 1965) (attorneys' fees).

26. *In re Greenberg's Estate*, 46 Misc. 2d 883, 261 N.Y.S.2d 176 (Surr. Ct. 1964), *aff'd*, 24 App. Div. 2d 435, 260 N.Y.S.2d 818 (1st Dep't 1965). Cf. *In re Morisan's Will*, 46 Misc. 2d 284, 259 N.Y.S.2d 445 (Surr. Ct. 1965).

tributees on the ground that a confiscatory rate of exchange would substantially impair the heir's "benefit or use" of the funds as required by New York law. Czechoslovakian legatees fared better in another New York decision on a showing that a system of gift certificates was available under which the legatees could receive the benefit of their gifts for purchases in Czechoslovakia,²⁷ and Polish heirs were permitted by the Oregon Supreme Court to take Oregon land owned by a Washington decedent.²⁸

II

WILLS

Testamentary Character and Intent.—Sources of perennial confusion are the myriad forms of bank accounts which in one way or another serve a testamentary function and are thus vulnerable to attack as being in contravention of the Statute of Wills.²⁹ One of the earliest cases expressly validating the survivorship feature of a joint-and-survivor bank account, based on contract theory and aided by statute,³⁰ was a 1935 Wisconsin case.³¹ This year the Wisconsin court again took a strong stand in favor of upholding such arrangements wherever possible by refusing to negate the survivorship feature of a joint account where the survivor clearly never had—and was not intended to have—any control over the account during the decedent's lifetime.³² By expressly relying on the force of the Wisconsin statute,³³ the court was able to distinguish rather than overrule its earlier decision³⁴ that a "pay-on-death" provision (even though a part of the deposit contract) will be regarded as testamentary and invalid where the account itself is not in joint form.³⁵ The Vermont Supreme Court has

27. *In re Reidl's Will*, 23 App. Div. 2d 171, 259 N.Y.S.2d 217 (1st Dep't 1965), on this point reversing the Surrogate's Court, 39 Misc. 2d 805, 242 N.Y.S.2d 105 (Surr. Ct. 1963).

28. *State Land Bd. v. Schwabe*, 400 P.2d 10 (Ore. 1965).

29. See *Kepner*, *Five More Years of the Joint Bank Account Muddle*, 26 U. Chi. L. Rev. 376 (1959). See also the text accompanying notes 140-43 *infra*, concerning Totten trust accounts.

30. Wis. Stat. Ann. § 221.45 (1957).

31. *In re Staver's Estate*, 218 Wis. 114, 260 N.W. 655 (1935).

32. *In re Michaels' Estate*, 26 Wis. 2d 382, 132 N.W.2d 557 (1965). See also *In re Fucela's Estate*, 26 Wis. 2d 476, 132 N.W.2d 557 (1965).

33. The courts have tended to regard such statutes as being for the bank's protection and not as conclusive of the survivor's right to the deposit as against the decedent's estate. See *Kepner*, *supra* note 29, at 378-79.

34. *Tucker v. Simrow*, 248 Wis. 143, 21 N.W.2d 252 (1946).

35. Although the court is obviously in sympathy with the survivorship bank account as a testamentary device, its explicit reliance on the statute relating to joint accounts as overcoming the Statute of Wills would seem to preclude any approval of the nonjoint, "pay-on-death" account in the absence of additional legislation.

recently ruled against the latter device,³⁶ traditionally the hardest for the courts to accept.³⁷

Contracts to Make Wills.—A number of recent cases illustrate the multiplicity of problems facing the court when a contract to bequeath is alleged. In *Kimmel v. Roberts*,³⁸ the nieces and nephews of a deceased husband sought “specific performance” of a contract between their uncle and his wife to execute mutual reciprocal wills. The wife, who survived her husband and took under his will, had made a later will favoring her own relatives. At least five of the seven members of the Nebraska Supreme Court agreed that the claim was rightly dismissed—two because the Statute of Frauds was a bar, two because the evidence was insufficient to show the existence of a contract, and one for both reasons (although the latter ground was not in his opinion necessary to the result). Two dissenters disagreed on both counts. Apparently the only evidence of contractual intent was an expression by the decedents to their attorney of a desire to enter into a “joint will,” which the attorney advised against because “it ties you up and forfeits the wife getting the benefit of the marital deduction.”³⁹ If so, a majority of the majority seems clearly correct in holding that insufficient evidence was presented to justify finding a binding contract.⁴⁰ In contrast, an Illinois appellate court decision exemplifies the tendency to hold that a joint will of husband and wife was intended to be contractual in nature, even in the absence of any other evidence.⁴¹ It is difficult to see why the intention to irrevocably bind the survivor should be more strongly evidenced by one instrument than by two,⁴² but the persistence of such decisions requires the careful attorney to anticipate more of the same.⁴³ A good rule of thumb might perhaps be never to employ a joint will unless there is some compelling reason why separate reciprocal wills will not serve, and never without including a clause expressly affirming or disclaiming contractual intent.⁴⁴

36. *Methodist Church v. First Nat'l Bank*, 211 A.2d 168 (Vt. 1965).

37. See Note, 53 Colum. L. Rev. 103, 113 (1953).

38. 136 N.W.2d 208 (Neb. 1965).

39. *Id.* at 212. See Int. Rev. Code of 1954, § 2056, and Treas. Reg. § 20.2056(e)–2(a) (1958). See generally 1964 Ann. Survey Am. L. 192-95.

40. See, e.g., the cases cited in 1 Page, Wills § 10.48 n.19 (Bowe-Parker rev. 1960).

41. *Helms v. Darmstatter*, 56 Ill. App. 2d 176, 205 N.E.2d 478 (1965).

42. See 1962 Ann. Survey Am. L. 428-29.

43. Compare, two recent decisions by the New York Court of Appeals indicating that the form of instrument used may well be decisive: *Oursler v. Armstrong*, 10 N.Y.2d 385, 179 N.E.2d 489, 223 N.Y.S.2d 477 (1961) (reciprocal wills but no contract) and *Rich v. Mottek*, 11 N.Y.2d 90, 181 N.E.2d 445, 226 N.Y.S.2d 428 (1962) (joint will held a contract).

44. Such a clause has been suggested for use in reciprocal wills as well. See *Estate of Croulek*, 252 Iowa 700, 107 N.W.2d 77 (1961).

In relying in part on the Statute of Frauds,⁴⁵ the court in *Kimmel* pointed out that neither the execution of reciprocal wills nor the acceptance of property thereunder by the survivor is a part performance "referable solely to the oral agreement sought to be established."⁴⁶ Not every court will be so strict in upholding the bar of the Statute,⁴⁷ and since "clear and convincing proof" is usually required in any event, it may well be argued that the claimant should be given the chance to prove the oral agreement if he can.⁴⁸

The problems of proof are even greater where the contract sought to be enforced was in favor of someone other than a spouse.⁴⁹ Assuming such a contract can be established, what is its effect where the rights of a surviving spouse are asserted in opposition? It can be argued that a contract to bequeath, if duly performed, produces a will which—like any other will—is subject to a spouse's right of election or similar rights.⁵⁰ On the other hand, where such a contract has been breached by the making of a new will, the cause of action that arises is generally said to be contractual against the estate, rather than a right to contest probate.⁵¹ Is it thus only one of the debts of the estate, to which the spouse's rights (other than common law dower) are traditionally subject?⁵² Two recent cases involved a problem of this type. In *Simpson v. Dodge*,⁵³ the Georgia Supreme Court held that where, by statute, marriage works a revocation of an existing will which fails to make any provision in contemplation thereof, no ex-

45. Some states have a specific requirement of writing for contracts to bequeath; even in those which do not, the real estate clause or (incorrectly) the one-year clause may be held to apply. See 1 Page, Wills § 10.11 (Bowe-Parker rev. 1960).

46. *Kimmel v. Roberts*, 136 N.W.2d 208, 210 (Neb. 1965). The concurring minority opinion suggested that inter vivos transfers pursuant to a common plan might have sufficed to take the case out of the statute.

47. E.g., *Hagan v. Laragione*, 170 So. 2d 69 (Fla. Dist. Ct. App. 1964) ("part performance and estoppel").

48. Of course where a court is inclined to be quick to discern contractual intent in mere reciprocal provisions or a joint will, a strict attitude toward the Statute of Frauds may afford some corrective, but two wrongs can't be trusted to always make a right.

49. E.g., *In re Shirk's Estate*, 194 Kan. 424, 399 P.2d 850 (1965); *Bickwell v. Guenther*, 399 P.2d 598 (Wash. 1965).

50. There appears to be no disagreement that the spouse's rights will prevail where the marriage preceded the contract. See 1 Page, Wills § 10.24 (Bowe-Parker, rev. 1960).

51. See, e.g., *In re Estate of Middaugh*, 179 Neb. 25, 136 N.W.2d 217 (1965), a companion case to *Kimmel v. Roberts*, 136 N.W.2d 208 (Neb. 1965).

52. On this question, see generally Sparks, Contracts to Make Wills, ch. XI (1956).

53. 220 Ga. 705, 141 S.E.2d 532 (1965).

ception can be made in the case of a will executed pursuant to contract.⁵⁴ On the other hand, a Florida court has held (distinguishing two earlier cases involving the widow's right to dower) that a surviving husband's claim as a pretermitted spouse will not extend to that portion of his wife's estate which she had contracted with her first husband to will to his brothers and sisters.⁵⁵

Mental Capacity and Undue Influence.—The usual number of decisions in this area—significant in the aggregate only for their existence, not for their manner of disposition—appeared during the past year.⁵⁶ One case did present a problem of capacity which was knotty enough to divide the Oklahoma Supreme Court, five-to-two. In *Lynn v. Ada Lodge No. 146*,⁵⁷ the testator, who left his whole estate to his local Odd Fellows Lodge, had been confined at different times in various mental hospitals. He blamed his family for causing at least one such hospitalization, and gave to the lodge all credit for his release—the former belief was justified, but no evidence was offered (and apparently no one but the testator believed) that the lodge had anything to do with his leaving the hospital. The majority affirmed the will's admission to probate, holding that the evidence justified the lower court in finding general mental capacity, but also pointing out that there was no evidence to justify “the conclusion that the will would have been different” if decedent's mental condition had not existed.⁵⁸ The dissent argued strongly that the evidence justified a finding of insane delusion with respect to the lodge's role in testator's release (a point on which the probate court had not ruled), and declared that in such a case the will should be upheld only on the basis of evidence that testator would have bestowed his bounty on the lodge in the absence of such delusion.⁵⁹ Indeed, since the proponent of a will usually has the

54. The court implied that a contract claim would also fail, on the ground that the contract would be interpreted to give plaintiffs no protection against revocation by operation of law. Since later contractors can always expressly cover this contingency, the court might better have based its decision simply on the ground that the spouse's marital right under the statute will be given priority over a preexisting contract to bequeath, if (as seems likely) that was the real reason for its conclusion.

55. *Hagan v. Laragione*, 170 So. 2d 69 (Fla. Dist. Ct. App. 1964). Cf. *In re Drown's Estate*, 60 Wash. 2d 110, 372 P.2d 196 (1962).

56. A recent article attempts to suggest measures which the attorney might adopt to avoid future attacks on wills of elderly clients; the authors contribute a helpful discussion of the medical terminology currently in fashion, but are probably overly optimistic about the willingness of the bar and/or their elderly clients to bear the cost and embarrassment of psychiatric examinations. Smith & Hager, *The Senile Testator: Medicolegal Aspects of Competency*, 13 Clev.—Mar. L. Rev. 97 (1964).

57. 398 P.2d 491 (Okla. 1965).

58. *Id.* at 497.

59. Presumably, neither side would hold that the bequest should be struck down simply because an insane delusion was a contributing cause, if it would probably have been made anyway; the test should be a “but for” test.

initial burden of establishing capacity,⁶⁰ perhaps it is only fair to impose on him the burden of proving the will not to be the product of an insane delusion once the existence of such a delusion is established—at least in a case such as *Lynn*, where the character of the delusion and the “unnatural” nature of the will combine to suggest strongly that the delusion was at least a contributing cause of the bequest.⁶¹

A number of cases deal with the presumption of undue influence arising where one in a fiduciary capacity to testator takes some part in procuring a will which materially benefits him.⁶² Of these, two seem to go too far, in opposite directions. The Michigan Supreme Court, over two dissents, has declared that a presumption of undue influence arises (and remains as evidence for the jury even where evidence to the contrary is introduced) on a showing merely of a fiduciary relationship plus a will benefiting the fiduciary, with no evidence either of actual undue influence or even of any activity in procuring the will.⁶³ At the other extreme, the Supreme Court of Georgia recently held that no presumption of undue influence was created by a showing that testatrix' nephew and sole beneficiary, an attorney, prepared the will and supervised its execution.⁶⁴ The court points out that the “undisputed” evidence was that the nephew's activity was merely in response to testatrix' request; there is no indication, however, that such evidence was supplied by any one other than the nephew himself.

Execution.—Generally, this past year, the courts have been willing to find compliance with the wills statute despite misplaced attestation

60. See Atkinson, Wills § 101 (2d. ed. 1953).

61. The burden of proof also was decisive in *Hummer v. Betenbough*, 404 P.2d 110 (N.M. 1965). After citing authority to the effect that undue influence invalidates only that part of a will caused thereby, the court nevertheless held the entire will invalid because there was “no evidence concerning the reasons or basis for” a particular gift, despite the lack of any evidence of undue influence on the part of the affected legatee. The decision is particularly unfortunate because the case is one of first impression in New Mexico.

62. *Short v. Stephenson*, 238 Ark. 1048, 386 S.W.2d 501 (1965); *In re Beckley's Estate*, 233 Cal. App. 2d 341, 43 Cal. Rptr. 649 (Dist. Ct. App. 1965); *Pasternak v. Mashak*, 392 S.W.2d 631 (Mo. Ct. App. 1965).

63. *In re Wood's Estate*, 374 Mich. 278, 132 N.W.2d 35 (1965), criticized, 40 Notre Dame Law. 676.

64. *White v. Irwin*, 230 Ga. 836, 142 S.E.2d 25 (1965).

65. *In re Leitstein's Will*, 46 Misc. 2d 656, 260 N.Y.S.2d 406 (Surr. Ct. 1965) (attestation clause in form of affidavit); *In re Angevine's Will*, 45 Misc. 2d 389, 256 N.Y.S.2d 952 (Surr. Ct. 1965) (signature of testator preceding date and testimonium clause held to satisfy requirement of signing at end); *Ward v. First-Wichita Nat'l Bank*, 387 S.W.2d 913 (Tex. Civ. App. 1965) (name appearing in first line of holograph sufficient signature); *In re Baxter's Estate*, 16 Utah 2d 284, 399 P.2d 442 (1965) (signature of testator after attestation clause held to satisfy requirement of signing at end).

clauses and signatures.⁶⁵ There have been exceptions. In a Texas case,⁶⁶ the testator and the witnesses (at the direction of a notary public) signed the "self-proving" affidavit instead of the will. Although the will and the affidavit were bound together as one document, the court held that they were in fact two separate documents and consequently that the will was not signed.⁶⁷

On an issue of first impression, a Florida court of appeals was faced at one time with three cases, each involving a will signed by the testator with an "X."⁶⁸ The court interpreted the statutory requirement that the testator "sign" his will to mean that the testator must sign *his name* thereto; accordingly, it refused probate to all three wills. The court justified the result by pointing to the possibility of fraud where a mark is used as a signature, and by finding legislative intent that the testator sign his name in the requirement that any one signing for him must sign the testator's name.⁶⁹ This appears to be poor statutory interpretation, and even poorer public policy since it penalizes the poor and illiterate for no good reason; as the dissent points out, witnesses are the real protection against fraud. So long as proxy signing is allowed at all, mark signing presents no increased danger of fraud.⁷⁰

A number of cases concerned holographic wills. In Connecticut, a borrowing statute, providing that any will valid where executed may be admitted to probate in Connecticut, was held by the Supreme Court to permit probate of a holographic California codicil.⁷¹ Holding itself bound by precedents of the state's high court, a Louisiana court of appeal was forced to deny probate to a holographic will solely because the date was not clearly legible, even though the date was of no other im-

66. *McGrew v. Bartlett*, 387 S.W.2d 702 (Tex. Civ. App. 1965).

67. Though seemingly open to criticism as unduly harsh, the decision has received rather effusive approval in a student comment. 16 *Baylor L. Rev.* 443 (1964).

68. *In re Williams' Estate*, 172 So. 2d 464 (Fla. Dist. Ct. App. 1965); *In re Zarkey's Estate*, 172 So. 2d 465 (Fla. Dist. Ct. App. 1965); *In re Levitt's Estate*, 172 So. 2d 466 (Fla. Dist. Ct. App. 1965).

69. Fla. Stat. § 731.07 (1959).

70. Sitting in two of the three cases, Judge Tillman Pearson showed a higher regard for *stare decisis* than for the strength of his legal judgment. Judge Pearson dissented in the first case, but concurred in the third with the following opinion: "I concur in the instant decision because of the prior decision in *In re Williams* . . . to which I dissented. I did not state the grounds of my dissent in that case because they are adequately set forth in the attached dissent by Judge Norman Hendry." *In re Levitt's Estate*, 172 So. 2d 466 (Fla. Dist. Ct. App. 1965). Had he sided with Judge Hendry, at least one of the three cases would have been decided as he thought proper. (Judge Hendry had his problems, too; see his opinion in *In re Shifflet's Estate*, 170 So. 2d 96 (Fla. Dist. Ct. App. 1964).)

71. *Owens v. Doyle*, 152 Conn. 199, 205 A.2d 495 (1964).

portance in the case.⁷² On the other hand, the Court of Appeals of Kentucky gave recognition to the homemade nature of such wills, admitting to probate a holograph written on a printed form where the printed words were "mere surplusage."⁷³

Incorporation and "Pour-Over."—In *Mastin v. First Nat'l Bank*,⁷⁴ the Supreme Court of Alabama was asked to apply a clause in testatrix' will which purported to pour assets into a trust established under the will of her deceased father, where in fact the trust under her father's will had failed to come into being because the contingency to its establishment had failed. The court held that the disposition in question could be sustained on the theory of incorporation by reference.⁷⁵ At least three more states, including New York (the source of much of the confusing case law in this area⁷⁶), have adopted statutes expressly validating "pour-over" into an existing trust.⁷⁷

Mistake, Omission—Pretermitted Heirs.—The Oklahoma Supreme Court reached seemingly conflicting results during the past year in two cases involving omitted heirs. A five-man majority decided in *Pease v. Whitlatch*⁷⁸ that mention (by name) of testator's granddaughter in a paragraph of the will describing the testator's family indicated that she had been intentionally omitted from subsequent paragraphs devising property to the other named members of the family. The three dissenters maintained that the majority was in effect ignoring the statute's express allocation to the proponent of the burden of proof on the issue of intent to omit.⁷⁹ The dissenters' approach was later adopted by a unanimous

72. Succession of Koerkel, 174 So. 2d 213 (La. Ct. App. 1965). The opinion illustrates the difficulty created by the legislative requirement that a holographic will be dated in order to be valid. The court, clearly unhappy with the state of the law, suggests that the legislature reexamine the statutory requirement of a date. *Id.* at 216.

73. Fairweather v. Nord, 388 S.W.2d 122 (Ky. 1965). But cf. Blankenship v. Blankenship, 276 Ky. 707, 124 S.W.2d 1060 (1939), in which the court seemed to have adopted the "intent" rule. See Atkinson, Wills § 75 (2d ed. 1953).

74. 177 So. 2d 808 (Ala. 1965).

75. Even under the new statutes, the doctrine of incorporation by reference may still be useful; the trust in the Mastin case would not be sustained by the New York statute (note 77, *infra*).

76. E.g., *In re Rausch's Will*, 258 N.Y.327, 179 N.E.755 (1932); *President & Directors of Manhattan Co. v. Janowitz*, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940); *In re Ivie's Will*, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293, (1958).

77. California and New Mexico have adopted the Uniform Testamentary Additions to Trusts Act (permitting pour-over to inter vivos or testamentary trusts). Calif. Prob. Code § 170 (Supp. 1965); Laws of N.M. 1965, ch. 26. New York will now permit pour-over to an existing inter vivos trust. N.Y. Deced. Est. Law § 47-g (Supp. 1965).

78. 397 P.2d 894 (Okla. 1964).

79. Okla. Stat. Ann. tit. 84, § 132 (1961), states that an omitted child shall have an intestate share "unless it appears that such omission was intentional. . . ."

court in *In re Daniel's Estate*,⁸⁰ where it was held that the incidental mention of a daughter in a devise to "my grand-daughter, Myrtle Cass, the daughter of my adopted daughter, Myrtle Cass"⁸¹ did not by itself demonstrate an affirmative intent to disinherit the daughter.⁸² This view may be consistent with the general legislative intent to protect children against unintentional omission by placing the burden of proof on one who would claim their omission to have been intentional, but it does run counter to the usual rule that any mention *by name* in a will is sufficient to defeat a claim that omission to provide for the named individual was unintentional.⁸³ A similar problem faced a California appellate court, which held a blanket provision that "except as otherwise provided in this Will I have intentionally omitted to provide for any of my heirs living at the time of my death" sufficient to show intent to omit the testator's grandchildren (whose mother, testator's daughter, had died before the making of the will).⁸⁴ Although the court does not foreclose the possibility of a contrary result on the basis of additional evidence of lack of intent to omit, it seems likely that the court's tolerance of such a simple device of avoidance may in short order induce California draftsmen to shift the burden of proof (which California's statute, like Oklahoma's, imposes on the proponent) to any omitted heir as a matter of routine.

A number of cases which raised the question of whether an (apparently) omitted bequest should be implied (on varying facts and with varying results) are noted below.⁸⁵

Charitable Bequests.—Eleven jurisdictions have statutes which restrict testamentary gifts to religious or other charities: some limit the amount or proportion of the estate which can be so bequeathed; others invalidate in whole or part a gift made in a will executed within a prescribed period of time before the testator's death; still others in some manner combine both limitations.⁸⁶ The wisdom of the statutes is at best doubtful,⁸⁷ par-

80. 401 P.2d 493 (Okla. 1965).

81. *Id.* at 495.

82. With the result that the children of that daughter (who predeceased the testator) divided the share their mother would have taken as an omitted heir had she survived, even though none of them were "heirs" when the will was made, and even though one of them had been singled out (by name) for a specific devise.

83. 2 Page, Wills § 21.107 (Bowe-Parker rev. 1960).

84. *In re Groscup's Estate*, 231 Cal. App. 2d 535, 536, 42 Cal. Rptr. 21 (Dist. Ct. App. 1964).

85. *Spathariotis v. Spathas' Estate*, 398 P.2d 39 (Colo. 1965), 42 Denver L. Center J. 52; *In re Imperato's Estate*, 24 App. Div. 2d 593, 262 N.Y.S.2d 343 (2d Dep't 1965); *In re Brahaney's Will*, 46 Misc. 2d 901, 261 N.Y.S.2d 517 (Surr. Ct. 1965); *Davis v. Anthony*, 384 S.W.2d 60 (Tenn. Ct. App. 1964).

86. Schwartz, *The Ohio Mortmain Statute—As Amended*, 17 W. Res. L. Rev. 83 (1965).

87. See generally N.Y. Temporary Comm'n on Law of Estates, Fourth Report, Legislative Doc. No. 19, at 155-75 (1965).

ticularly those which do not even do a reasonably good job of protecting the preferred relatives.⁸⁸ In 1965, two states, Idaho⁸⁹ and Ohio,⁹⁰ significantly reduced the scope of their statutes in this area.

Where the challenged gift in a will made within the statutory period simply repeats a bequest made in an earlier valid will, the rationale of this type of mortmain statute is inapplicable, and many states uphold the later gift, either by express provision in the statute⁹¹ or by judicial exception.⁹² In Pennsylvania, the statute has since 1947 provided for such an exception where the "original" of the earlier will can be produced "in legible condition."⁹³ The Supreme Court of Pennsylvania has recently construed this exception to extend to a case where only an unexecuted carbon copy of the earlier will could be produced.⁹⁴ The court's citation of precedent may perhaps be doubtful,⁹⁵ but the decision seems clearly in harmony with the intent of the 1947 attempt to liberalize the statute.⁹⁶

Revocation.—During this past year, the legislatures continued to re-define revocation by operation of law, while the courts were faced with difficult problems concerning the quality of proof necessary to establish revocation by act or subsequent instrument. In Illinois, marriage no longer will effect revocation by operation of law,⁹⁷ while Oregon's statute now provides that annulment of a marriage automatically revokes a will made during the marriage (unless the will itself provides otherwise).⁹⁸

It is black letter law that one may revoke his will by mutilating the document.⁹⁹ But when the will is found among testator's effects by an

88. In New York, the mortmain statute can be evaded "by the simple expedient of providing in the will for an alternate disposition to a noncharitable legatee in the event of a contest under the statute." *Id.* at 160-61.

89. Idaho Sess. Laws 1965, ch. 109, permits an unlimited bequest to charity even within the prescribed thirty-day period provided \$100,000 first goes to testator's lineal descendants.

90. Ohio Rev. Code § 2107.06 (Supp. 1965) now permits a bequest of up to 25% of the net estate, even where the will was executed during the six months prior to death (formerly an absolute prohibition during a one-year period). See Schwartz, *supra* note 86.

91. E.g., Fla. Stat. Ann. § 731.19 (1964).

92. E.g., *Linkins v. Protestant Episcopal Cathedral Foundation*, 187 F.2d 357 (D.C. Cir. 1950).

93. Pa. Stat. Ann. tit. 20, § 180.7 (1950).

94. *Matter of Estate of Baum*, 211 A.2d 521 (Pa. 1965), 69 Dick. L. Rev. 407.

95. 211 A.2d at 525 (dissenting opinion).

96. See Schwartz, *supra* note 86, at 98-99. As the court points out, a lost will may even be admitted to probate in Pennsylvania without production of the original executed will, and no reason is apparent why a higher standard of proof should be required in the area of charitable gifts.

97. Ill. Rev. Stat. ch. 3, § 46 (1965).

98. Ore. Rev. Stat. § 114.130 (Supp. 1965).

99. See generally Hoffman, *Revocation of Wills and Related Subjects* (pts. 1 & 2), 31 Brooklyn L. Rev. 220; 32 Brooklyn L. Rev. 1 (1965).

interested party who would be benefited if the testator died intestate, and the will is presented for probate in a mutilated condition, should the court indulge the usual presumption that it was the testator himself who mutilated the document with the intention of revoking it? The appellate court of Illinois answered this question in the affirmative where a disinterested party was also present when the will was found.¹⁰⁰ However, another district of that same court struggled long and hard to find that the presumption of revocation did not arise where an interested party came into sole possession of the will before the testator's death. In *Stefany v. Synek*,¹⁰¹ the testatrix' nephew removed the will from her home for several days while she was in the hospital. After the will had been returned, the testatrix died without ever returning home. Rather than rule that a presumption of revocation could not be based solely on the testimony of the interested nephew (who would have benefited considerably from an intestacy in his aunt's estate), the court relied on a supposed rule that the document must be in the testator's possession and control *at the time of death* in order that the presumption of revocation from mutilation be available to the contestant.¹⁰² Although the result may be proper, the court will be faced with the problem of reexplaining *Stefany* should a case arise where the will (already mutilated) is taken by a disinterested party before the testator's death.¹⁰³

Attempted partial revocation received contrasting treatment in two cases arising this past year, one in New York¹⁰⁴ and one in Florida.¹⁰⁵ The revocation statutes in both states are similar, both providing that a will may be altered by a subsequent writing executed with the same formalities with which the will itself was required to be executed.¹⁰⁶ In each case changes had been made in the margin of the will alongside the provision sought to be altered; the changes were signed¹⁰⁷ and at-

100. *In re Riner's Estate*, 59 Ill. App. 2d 434, 207 N.E.2d 487 (1965).

101. 55 Ill. App. 2d 464, 205 N.E.2d 265 (1965).

102. "This is not a finding that Stefany was guilty of any offense, but solely a question of determining whether the requirement that the testator shall have possession and control at the time of death has been met." *Id.* at 473, 205 N.E.2d at 269.

103. The reverse situation was presented where a mutilated will was found by one interested in its being admitted to probate; she testified to circumstances indicating it had been carefully preserved by the decedent, and probate was allowed. *In re Bonner's Will*, 23 App. Div. 2d 747, 258 N.Y.S.2d 727 (1st Dep't 1965) (two justices dissenting).

104. *In re Carner's Will*, 46 Misc. 2d 319, 258 N.Y.S.2d 979 (Surr. Ct. 1965).

105. *In re Shifflet's Estate*, 170 So. 2d 96 (Fla. Dist. Ct. App. 1964).

106. N.Y. Deced. Est. Law § 34 and Fla. Stat. § 731.13 (1959). The requirements for execution of a will also are similar in both states; in particular, both have a "sign at the end" provision: N.Y. Deced. Est. Law § 21; Fla. Stat. § 731.07 (1959).

107. In the Florida case initials were used; the court assumed, expressly without deciding, that the requirement of a signature had been satisfied.

tested. The New York will was admitted to probate as revised, but the Florida will was admitted to probate as originally written, the Florida court refusing to probate the alterations on the ground of failure to comply with the statutory requirement that an instrument must be signed at the end (a point not discussed in the New York opinion). The Florida court found that "the revocation was signed at three separate places [*i.e.*, in the margin beside the changes], none of which constituted the end of the will."¹⁰⁸ A more sensible interpretation of the statute would seem to be that signing at the end of *each revocation* would be sufficient.¹⁰⁹

Construction—Adopted Heirs.—In a recent article,¹¹⁰ Professor Edward C. Halbach, Jr. has boldly stated a thesis that the courts have not only the power but also the duty to change a rule of construction when they see that it is no longer in harmony with prevailing popular attitudes and relevant social policies. Professor Halbach's best example of an area calling for judicial attention in this respect, as set forth in a second, complementary, article,¹¹¹ is the construction of gifts in wills and trusts to "heirs," "children," "issue," etc., where the question is the inclusion of adopted children within such a designated class. Although legislative policy in many states now clearly favors treating an adopted person as being completely integrated in his new family for inheritance purposes,¹¹² the courts have traditionally ruled that he will be held within such a designated class only if there is some affirmative evidence of intent to include.¹¹³

Fortunately it does appear that the courts are beginning to recognize the force of the factors Professor Halbach has noted. One example is in New York, where a recent statute has prospectively established a constructional preference in favor of adopted legatees.¹¹⁴ In *Matter of Estate of Park*,¹¹⁵ the New York Court of Appeals has now wrenched the law as to

108. 170 So. 2d at 99.

109. Although it reaches probably the better result, the New York decision appears to rely in part on the fact that in the margin also appeared the words "Change made Jan. 12, 1959." It would seem that an alteration on the face of the will sufficiently declares intent to alter without the need for additional explanatory comment; if signed and attested, it should be given effect.

110. Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 Calif. L. Rev. 921 (1964).

111. Halbach, *The Rights of Adopted Children under Class Gifts*, 50 Iowa L. Rev. 971 (1965).

112. See text accompanying notes 4-8 *supra*.

113. E.g., *Baker v. Giffrow*, 135 N.W.2d 629 (Iowa 1965).

114. N.Y. Deced. Est. Law § 49 (Supp. 1965).

115. 15 N.Y.2d 43, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965), 30 Albany L. Rev. 178 (1966), 15 Buffalo L. Rev. 209 (1965). To see the effect of this decision on New York law, compare *Matter of Estate of Grace*, 46 Misc. 2d 878, 261 N.Y.S.2d 236 (Surr. Ct. 1965), with *Matter of Estate of Ricks*, 45 Misc. 2d 919, 258 N.Y.S.2d 171 (Surr. Ct. 1965).

preexisting instruments almost completely into line with the new statute. The same process was begun last year by New Jersey's Supreme Court,¹¹⁶ and continued this year in that state without interruption.¹¹⁷ Of course, decisions following the old rule continue to appear,¹¹⁸ and an ominous note has been sounded by the North Carolina Supreme Court. In *Wachovia Bank & Trust Co. v. Andrews*,¹¹⁹ the court succeeded in finding some evidence of an intent that adopted grand nieces and nephews should not be included in the class of takers, thereby avoiding (at least to the court's satisfaction) the new North Carolina statute creating a constructional preference in favor of adopted children. The significance of the opinion is in its clear implication that to the extent the statute purports to change the constructional preference applicable to preexisting instruments, it is unconstitutional.¹²⁰ Luckily at this stage this opinion is only a dictum; perhaps by the time the court is really called upon to decide this point it will have had a chance to consider Professor Halbach's persuasive arguments to the contrary.¹²¹

Ademption.—The leading case of *Ashburner v. Macguire*¹²² represents the so-called modern view that the testator's intention is immaterial on the issue of ademption: the sole question is whether the subject matter of a specific legacy is in the estate at date of death.¹²³ This rule gives a harsh result (especially if the specific legatee is a favored relative) in a case where the property was sold by a guardian after the testator had been declared incompetent, and in the majority of states today the rule applied is that such a sale will not work an ademption as to any portion of the proceeds of the disposition which at time of death has not yet been expended for the benefit of the testator and can be traced into the assets of the estate.¹²⁴

This year, the highest courts of California and Iowa were both presented with cases involving a guardian's sale of realty specifically devised by the testator before he became incompetent. In each case the proceeds

116. *Matter of Estate of Coe*, 42 N.J. 485, 201 A.2d 571 (1964), 1964 Ann. Survey Am. L. 587.

117. *Matter of Estate of Stillman*, 88 N.J. Super. 168, 211 A.2d 222 (Union County Ct. 1965).

118. *Baker v. Giffrow*, 135 N.W.2d 629 (Iowa 1965).

119. 142 S.E.2d 182 (N.C. 1965).

120. 142 S.E.2d at 186-87.

121. Halbach, *supra*, notes 110 and 111. Perhaps the most useful part of Professor Halbach's Calif. L. Rev. article is the section entitled "Retroactivity and the Myth of Reliance" (pp. 945-53) in which he attempts to dispel the traditional notion that retroactivity of any sort has no place in the field of "property law."

122. 2 Bro. C.C. 108, 29 Eng. Rep. 62 (1786).

123. See 6 Page, Wills § 54.15 (Bowe-Parker Rev. 1962).

124. *Id.* § 54.18.

of sale had been wholly or substantially consumed, but the devisee argued that his specific devise should not be adeemed regardless of whether the proceeds of the sale could be traced. In *Stake v. Cole*,¹²⁵ the Iowa Supreme Court rejected this argument, stating it could find no decision in which ademption had been avoided merely because other property of the testatrix might have been used for her care. The court conceded that specific legacies abate last, but declared: "The general rule for abatement of legacies has no application here."¹²⁶ However, *Estate of Mason*¹²⁷ held that the California devisee could have his gift redeemed from the remainder of the estate. Writing for a unanimous court, Chief Justice Traynor reasoned that the general rules of abatement were applicable, because "the expenses of guardianship . . . are not substantially different from expenses and debts of a decedent's estate," especially when one considers that if such guardianship expenses are not paid before the death of the incompetent they in fact do become debts of the estate.¹²⁸

Another interesting California case¹²⁹ involved the effect of undue influence upon ademption. In a case of first impression, a California court of appeals held that a specific devise is not adeemed where the residuary legatee exerted undue influence upon the testator in getting him to sell the property (the proceeds at the date of death being traceable to a bank account). The court cites the *Mason* case for the proposition that intent controls, but also cites it for the proposition that ademption would follow if the proceeds were not traceable.¹³⁰ The latter point seems doubtful.

Distribution—Shares of Stock.—The familiar problem of corporate distributions with respect to stock already bequeathed arose in an unusual

125. 133 N.W.2d 714 (Iowa 1965).

126. *Id.* at 720.

127. 62 Cal. 2d 213, 397 P.2d 1005, 42 Cal. Rptr. 13 (1965); accord, *Estate of Packham*, 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (Dist. Ct. App. 1965).

128. *Estate of Mason*, supra note 127 at 217, 397 P.2d at 1008, 42 Cal. Rptr. at 16. The decision has been criticized on the ground that in most cases the testator would prefer the residuary legatee over the specific legatee, if forced to choose. Comment, 40 Notre Dame Law. 670 (1965). Perhaps it does go too far in preferring the specific legatee, in a situation where the testator is in no position to protect either. Cf. the recent New York statute, adopting only the "traceable proceeds" rule. N.Y. Deced. Est. Law § 36 (Supp. 1965). Unfortunately, none of the suggested rules (not even the "intent" rule, which in this situation is really a "no-ademption-because-of-lack-of-intent" rule) gives a just result in every case, because the question is really one of determining which of two legatees the testator would have favored if he had known he could not favor both. In this light, a statute such as Iowa's requiring the guardian to deliver the will to the court and abide by its orders may be helpful in some situations. See *Stake v. Cole*, 133 N.W.2d 714, 720 (1965).

129. *Estate of Holmes*, 233 Cal. App. 2d 464, 43 Cal. Rptr. 693 (Dist. Ct. App. 1965).

130. *Id.* at 468-69, 43 Cal. Rptr. at 695-96.

form in 1965. In *duPont v. duPont*,¹³¹ the Delaware Supreme Court was called upon to decide whether shares of General Motors stock distributed by Christiana Securities to the testator would pass as part of a legacy of shares of Christiana stock bequeathed by him to a charitable trust, the stock having been distributed pursuant to a court order stemming from an antitrust action against E.I. duPont de Nemours & Company.¹³² The court could find only one case in point,¹³³ but elected not to follow its reasoning.¹³⁴ Finding that in the absence of any evident intent to the contrary testator's apparent intent to bequeath only the designated Christiana shares would govern, the court ruled that the General Motors shares passed under the residuary clause.

In Illinois, the 1964 appellate court decision in *Knight v. Bardwell*¹³⁵ was reversed by the Supreme Court of Illinois¹³⁶ on the ground that the testatrix's expressed intent was to bequeath the number of shares in question "as constituted" at her death, with the result that the legatee was denied the benefit of two intervening splits. The opinion is persuasive as to the evidence of intent,¹³⁷ but unfortunately the reversal will probably cast doubt (though only by implication) on the appellate court's sensible discussion¹³⁸ of the problems in this area and the general disutility of the "specific/general" test as a guide to decision.¹³⁹

III

TRUSTS

Creation.—The "tentative" savings bank trust—the so-called "Totten trust"—continues to generate litigation. In Illinois, the Supreme Court has put the final Illinois seal of approval on the *Restatement's* treatment of

131. 208 A.2d 509 (Del. 1965).

132. The shares had been owned by the duPont Company, which was in turn owned by Christiana. *Ibid.*

133. *Matter of Brann*, 219 N.Y. 263, 114 N.E. 404 (1916) (involving a forced distribution by Standard Oil of New Jersey of stock in various subsidiaries).

134. Although reaching the same result, the court in *Brann* (Cardozo, J.) had applied a test of "substantial identity." *Id.* at 267-68, 114 N.E. at 405.

135. 45 Ill. App. 2d 332, 195 N.E.2d 428 (1964), 1964 Ann. Survey Am. L. 599-600.

136. 205 N.E.2d 249 (Ill. 1965).

137. Especially as to the effect of a codicil executed after the first split. 205 N.E.2d at 251.

138. Citing, *inter alia*, *In re McFerren's Estate*, 365 Pa. 490, 76 A.2d 759 (1950); *Matter of Fitch*, 281 App. Div. 65, 118 N.Y.S.2d 234 (3d Dep't 1952).

139. See, e.g., *In re Kirkwood's Estate*, 31 Ohio Op. 2d 205, 207 N.E.2d 587 (P. Ct. 1965), in which a legacy of the exact number of shares owned by the testator was held to be general in the absence of any other evidence of intent, and thus not to pass additional split shares.

this device as an effective revocable trust,¹⁴⁰ not in contravention of the Statute of Wills.¹⁴¹ In New Jersey, Totten trusts established in Florida by a New Jersey domiciliary were upheld as valid against his estate; Florida law was applied.¹⁴² The Pennsylvania Supreme Court has held that the tentative trust doctrine as adopted in Pennsylvania will in its customary form be applied only to a case where the depositor deposits *his own funds* in his own name in trust for another, and that where the money deposited is the joint earnings of "trustee" and "beneficiary" (husband and wife), the usual trust presumption of irrevocability—rather than the "tentative trust" presumption of revocability—will apply.¹⁴³

Spendthrift Trusts.—Few cases this year involved spendthrift trusts. The Second Circuit Court of Appeals held that a restriction on assignment of principal as well as income would be effective under Vermont law to prevent an assignee from enforcing against the trustee an assignment of a remainder interest (made before the remainder was possessory but after it had vested) regardless of whether the remainderman had any interest in the income.¹⁴⁴

The problems of spendthrift trust beneficiaries continued to receive attention in New York, where trusts are spendthrift by statute. The 1964 statute,¹⁴⁵ permitting the beneficiary's gratuitous assignment to designated relatives of annual trust income in excess of 10,000 dollars, has been further liberalized to permit such assignments for a term of less than the entire period of the income interest.¹⁴⁶ Since the additional tax savings made possible by this latest amendment are probably limited,¹⁴⁷ it may be at least in part a reflection of willingness to relax New York's attitude toward spendthrift trusts generally; however, the limitation to gratuitous intrafamily assignments means that the beneficiary's interest is still a long way from being freely commercially transferable in New York.

140. At least as against assertions of "testamentary character"; the claims of decedent's creditors and surviving spouse may be upheld, however. See 1 Scott, Trusts § 58.5 (2d ed. 1956). See also text accompanying notes 12-20 *supra*.

141. Matter of Estate of Petralia, 32 Ill. 2d 134, 204 N.E.2d 1 (1965), affirming 48 Ill. App. 2d 122, 198 N.E.2d 200 (1964), 1964 Ann. Survey Am. L. 518.

142. In re Damato, 86 N.J. Super. 107, 206 A.2d 171 (App. Div. 1965), following Conry v. Maloney, 5 N.J. 590, 76 A.2d 899 (1950). It appears that the trusts would have been effective under New Jersey law, too. See Howard Savings Institution v. Kielb, 38 N.J. 186, 183 A.2d 401 (1962).

143. In re Brose's Estate, 416 Pa. 386, 206 A.2d 301 (1965).

144. Baker v. Vermont Bank & Trust Co., 342 F.2d 12 (2d Cir. 1965).

145. N.Y. Sess. Laws 1964, ch. 317, amending N.Y. Pers. Prop. Law § 15, Real Prop. Law § 103.

146. N.Y. Pers. Prop. Law § 15(1)(b) (Supp. 1965); N.Y. Real Prop. Law § 103(1)(b) (Supp. 1965).

147. See Lyon & Eustice, Assignment of Income: Fruit and Tree as Irrigated by the P.G. Lake Case, 17 Tax L. Rev. 295, 318-21 (1962).

Invasion of Principal.—As a recurring reminder of the limited prophetic powers of clients and attorneys alike, the cases continue to arise in which a destitute (or relatively so) income beneficiary petitions for the power to invade principal for support. Despite the unforeseen insufficiency of income and (in most cases) the close relationship between settlor and beneficiary, the courts have felt compelled to rule that no invasion is possible unless all whose interests would be adversely affected give consent. Since the other actual or potential beneficiaries often include persons unborn or incompetent to consent, the predictable result is a sympathetic denial.¹⁴⁸ This past year for the first time the Maryland Court of Appeals was faced with this issue, and fell in line without a murmur of regret. Where the testator had given his wife only a life interest in the income from certain realty, directing the trustee to retain the property in the trust, the court could give the widow—now aged and in need—no assistance other than permitting the trustees to mortgage the property for the purpose of making necessary improvements (thus at least preserving for the widow the reduced income payments, which otherwise would have been entirely consumed by these expenses).¹⁴⁹

In light of this state of the law, one of the most important events in the law of trusts this year is surely the adoption in New York of remedial legislation. New York has long had a statute permitting invasion of accumulated income in certain cases;¹⁵⁰ now, however, the principal of every new New York trust will (unless the trust instrument itself provides otherwise) be subject to a potential power of invasion for *any* income beneficiary (whether or not entitled by the terms of the trust to any part of principal) whose support or education is not sufficiently provided for “by the trust or otherwise,” provided the court is convinced this would be in harmony with the settlor’s intention.¹⁵¹ There is one major exception: to protect the charitable gift or estate tax deduction, the statute does not apply to trusts wholly or partly for charitable purposes.¹⁵² New York joins two other states, Pennsylvania and Wisconsin, with similar statutes;¹⁵³ we may hopefully expect others to follow suit.

148. E.g., *In re Van Deusen's Estate*, 30 Cal. 2d 285, 12 P.2d 565 (1947). Where relief is granted, it is nearly always by construing the trust instrument to contain a power to invade, express or implied; only a few decisions have admitted permitting invasion despite a complete lack of authority in the instrument. See 2 Scott, *Trusts* § 168 (2d ed. 1956).

149. *Staley v. Ligon*, 239 Md. 61, 210 A.2d 384 (1965).

150. N.Y. Pers. Prop. Law § 17; N.Y. Real Prop. Law § 62 (Supp. 1965).

151. N.Y. Pers. Prop. Law § 15-a (Supp. 1965); N.Y. Real Prop. Law § 103-a (Supp. 1965).

152. Seemingly a rather coldhearted allocation of priorities, but probably a realistic one in light of the relative number of needy-beneficiary cases. Compare *Estate of Nicely v. National Foundation for Infantile Paralysis*, 235 Cal. App. 2d 174, 44 Cal. Rptr. 804 (Dist. Ct. App. 1965).

153. Pa. Stat. Ann. tit. 20, § 301.2 (1950); Wis. Stat. Ann. § 231-12 (1957).

Income-Principal Allocation.—Two more states, Kansas¹⁵⁴ and Maryland,¹⁵⁵ have adopted the Revised Uniform Principal and Income Act and New York has enacted a recodification of its principal and income act patterned largely on the revised uniform act.¹⁵⁶ Further legislative approval of the revised act is evidenced by the action of three states¹⁵⁷ in adopting its treatment of distributions made by regulated investment companies and real estate investment trusts.¹⁵⁸

In 1964, the Wisconsin Supreme Court, in *In re Clarenbach's Will*,¹⁵⁹ narrowly construed a clause purporting to give trustees broad discretion in allocating receipts between income and principal; the court's decision in effect left the trustees little or no discretion as to any case where the law was clear. The decision has received additional unfavorable comment,¹⁶⁰ but the Rhode Island Supreme Court has recently issued a similar ruling.¹⁶¹

Trust Investments.—Two recent cases imposed heavy liability on trustees for failing to act promptly enough to dispose of stock held in trust. In *In re Mueller's Trust*,¹⁶² the trust's sole asset was stock of a corporation into which settlor's close corporation had been merged after creation of the trust. The Wisconsin Supreme Court placed heavy emphasis on the duty to diversify, although it appears from the opinion that the same result would have been reached simply on a test of "prudence." In a somewhat similar situation, a lower New York court imposed liability on the basis of failure to act diligently to effect a sale once the need to sell became apparent; the court pointed out that New York cases do not establish failure to diversify as being independently a breach of trust.¹⁶³

For a number of reasons, including the clear tendency of courts to

154. Kan. Laws 1965, ch. 344.

155. Laws of Maryland 1965, ch. 877.

156. N.Y. Pers. Prop. Law §§ 27-a to -q (Supp. 1965). See N.Y. Temporary Comm'n on the Law of Estates, Third Report, Legislative Doc. No. 19, at 1009 (1964). New York has abandoned the controversial rule (which never became effective) that would have allocated to principal 6% of every stock distribution, even a pure "split." See 1964 Ann. Survey Am. L. 524 n.64. As to the 6% rule in the form applied by the new New York statute, see Shapleigh, Jr., How Fair is the Six Percent Rule on Stock Distributions?, 104 Trusts & Estates 908 (1965).

157. Colo. Sess. Laws 1965, ch. 152; Conn. Sess. Laws 1965, Act 263; Tenn. Sess. Laws 1965, ch. 360.

158. Section 6(c) of the Revised Uniform Principal and Income Act. Accord, *Tait v. Peck*, 346 Mass. 521, 194 N.E.2d 707 (1963).

159. 23 Wis. 2d 71, 126 N.W.2d 614 (1964), 50 Iowa L. Rev. 656, 48 Marq. L. Rev. 262.

160. 1965 Wis. L. Rev. 391.

161. *Industrial Nat'l Bank v. Rhode Island Hosp.*, 207 A.2d 286 (R.I. 1965). But cf. *Sherman v. Sherman*, 32 Ohio Op. 2d 334, 202 N.E.2d 443 (P. Ct. 1962).

162. 28 Wis. 2d 26, 135 N.W.2d 854 (1965).

163. *In re Mendleson's Will*, 46 Misc. 2d 960, 261 N.Y.S.2d 525 (Surr. Ct. 1965). See generally Earp, To Diversify or Not, 104 Trusts & Estates 123 (1965).

construe as strictly as possible any clause limiting a trustee's liability for what would otherwise constitute breach of duty,¹⁶⁴ increasing attention is being given to the device of separating some or all control over trust management (especially of investments) from the trustee and vesting it in some third party (the settlor, a beneficiary or an independent party), with accompanying language exculpating the trustee from liability for loss arising from such third party's actions.¹⁶⁵ It appears that such division of authority may well result in a court's upholding an exculpatory clause where it would not have approved exculpation of the trustee if his own act were in question, despite the fact that the third party may have no liability either.¹⁶⁶ South Carolina and Texas have recently adopted statutes exonerating the trustee from liability in such a situation.¹⁶⁷ Along with Iowa and Nebraska, South Carolina has also recently adopted the "prudent man" rule for trust investments.¹⁶⁸

Charitable Trusts.—In Texas, a court of civil appeals has held that the trustees of Rice University have the power, under the indenture by which William Marsh Rice established Rice Institute, to admit as students qualified applicants regardless of color, and also to charge tuition;¹⁶⁹ the court dismissed an appeal by "former students, alumni, donors, contributors and beneficiaries" on the ground that appellants had no justiciable interest in the controversy. Noting that ordinarily the Attorney General has the "preclusive right" to sue for enforcement of a public charitable trust,¹⁷⁰ the court held that only a "peculiar or individual right, distinct from that of the public at large" will give standing in such a case to a private individual.¹⁷¹ Dismissing the interest of former students, alumni and past beneficiaries as merely "sentiment," the court did pause for a moment on the question of donors and contributors, but ruled that

164. E.g., *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 42 Cal. Rptr. 64 (Dist. Ct. App. 1965).

165. See Note, *Directory Trusts and the Exculpatory Clause*, 65 Colum. L. Rev. 138 (1965); Note, *Trust Advisers*, 78 Harv. L. Rev. 1230 (1965).

166. *Ibid.* Cf. *In re Cowles' Will*, 22 App. Div. 2d 365, 372, 255 N.Y.S.2d 160, 173-74 (1st Dep't 1965).

167. The statutes are nearly identical, except that the South Carolina version is limited to investment decisions. Acts & Joint Resolutions of S.C. 1965, Act 167; Tex. Sess. Laws 1965, ch. 280.

168. Iowa Laws 1965, ch. 432, § 9; Laws of Neb. 1965, ch. 113; Acts & Joint Resolutions of S.C. 1965, Act. 220.

169. *Coffee v. William Marsh Rice University*, 387 S.W.2d 132 (Tex. Civ. App. 1965). For an extremely interesting and provocative discussion of the problem, see Power, *The Racially Discriminatory Trust: A Suggested Treatment*, 9 St. Louis U.L.J. 478 (1965).

170. The Texas Attorney General had appeared in the trial court, but failed to join in the appeal; the court noted he had permitted appellants to "take the lead" at the trial. *Id.* at 134.

171. *Id.* at 135.

the donors to a general charitable fund—at least absent some “special interest” or reversionary interest—have no standing to enforce the charitable trust.¹⁷² As such cases become more and more frequent, it seems likely that the courts will continue to follow a restrictive policy on the question of standing in this area in order to prevent dissipation of charitable funds and to free perpetual trusts as early as possible from now-impractical restrictions.¹⁷³

172. Accord, Restatement (Second), Trusts § 399, comment *g* (1959). See 4 Scott, Trusts, § 391 (2d ed. 1956).

173. E.g., *Fenn College v. Nance*, 210 N.E.2d 418 (Ohio C.P. 1965).